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No. 90-909

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1990

PUREX CORPORATION, *et al.*,
Petitioners,

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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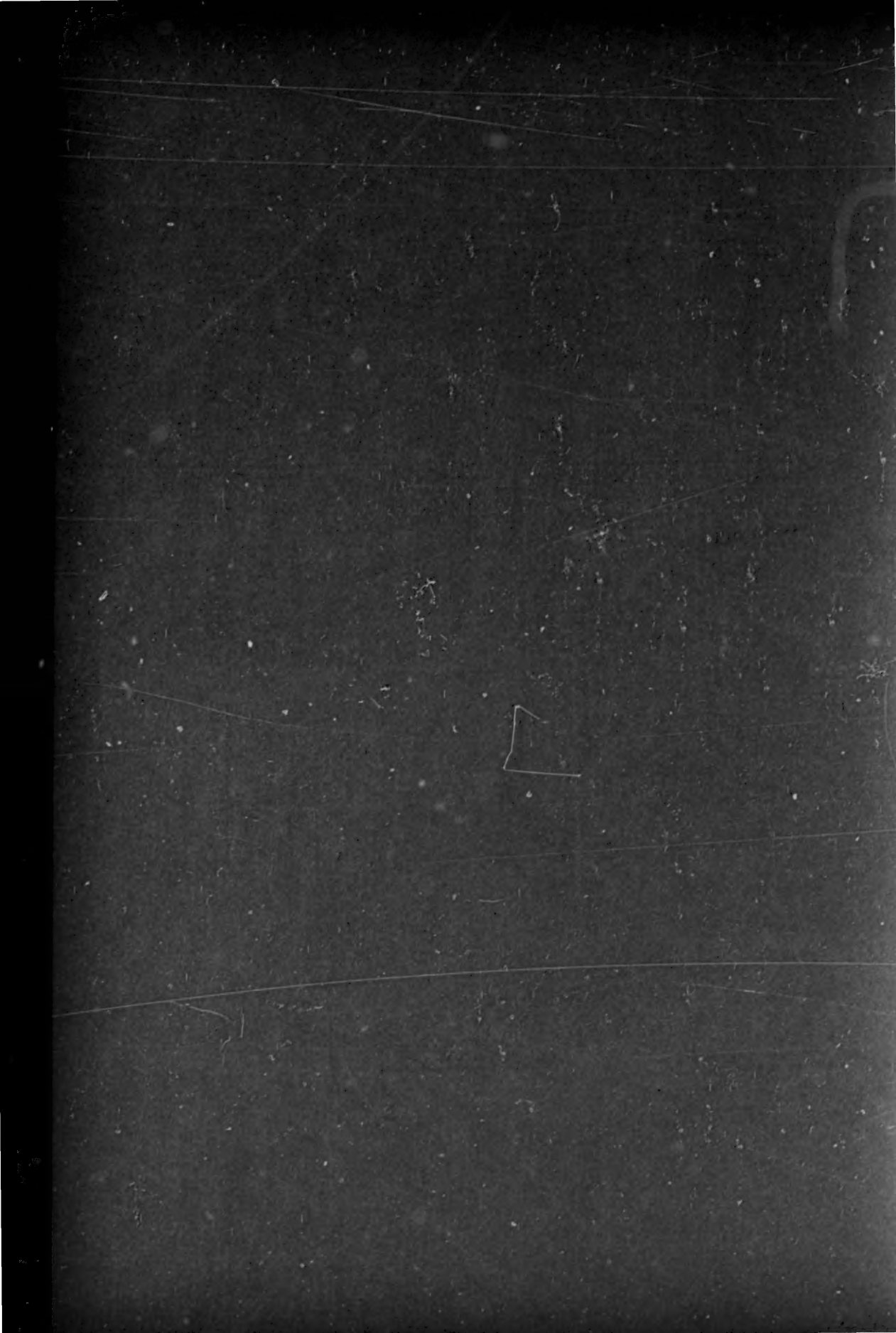

QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURTS OF APPEALS HAVE RENDERED CONFLICTING DECISIONS WITH RESPECT TO A DISTRICT COURT'S ABILITY TO ENFORCE A SETTLEMENT AGREEMENT IN AN ACTION THAT HAS BEEN CONDITIONALLY DISMISSED?

2. WHETHER PETITIONERS, PUREX CORPORATION, INC. AND THE DIAL CORPORATION (COLLECTIVELY "DIAL"), RAISED THE ISSUE OF THEIR ATTORNEYS' AUTHORITY TO ENTER INTO A SETTLEMENT AGREEMENT BEFORE THE DISTRICT COURT?

3. WHETHER DIAL RAISED THE ISSUE OF DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA IN THE COURT OF APPEALS FOR THE SIXTH CIRCUIT?

RULE 29.1 CORPORATE PARTY'S AFFILIATION

Respondent Willis Day Properties, Inc. ("Willis Day") does not have any parent companies or subsidiaries.

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REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG CIRCUIT COURTS OF APPEALS ON THE SPECIFIC ISSUE WITH WHICH THIS COURT IS PRESENTED.

A. The Various Circuit Courts Of Appeals Agree That A District Court Maintains Jurisdiction To Enforce A Settlement Agreement Where An Action Has Been Conditionally Dismissed.

Petitioners ask this Court to grant certiorari in this case to determine whether a district court has the inherent power to enforce a settlement agreement once the action which gave rise to that agreement has been dismissed. They claim that "[t]here is considerable controversy among the Circuit Courts of Appeals (and sometimes even within each Circuit) on the question whether a district court has jurisdiction to enforce a settlement after its dismissal of the underlying action." (Petition for Writ of Certiorari ("Petition") at page 10). While Petitioners are correct in stating that a conflict exists among Circuit Courts of Appeals with respect to a district court's inherent power to enforce a settlement after dismissal; the issue with which this Court is presented is much narrower.

Here, the only issue is whether a district court can retain jurisdiction to enforce a settlement agreement by entering a "conditional" dismissal of litigation pending before it. Willis Day contended on appeal that a district court had the inherent power to enforce a settlement generally.[1] It further contended that even if this general authority did not exist, the district court had the power

[1] It should be noted that Petitioners also asserted that a district court had the inherent power to enforce a settlement agreement in their Motion to Enforce the Settlement Agreement ("Motion to Enforce") originally filed with the district court. Petitioners only began asserting the contrary position when the district court made a factual finding that did not support their version of the agreement.

to enforce the settlement in this case because it retained jurisdiction over the matter through its conditional dismissal of the litigation. Without rejecting the former contention, the Sixth Circuit based its holding on the latter stating that "[t]he narrow issue presented is whether this is a 'conditional' or an 'unconditional' dismissal order as entered by the district court." (Appellate decision at Pet. App. page A4).

There is no conflict among the Courts of Appeals with respect to this narrow issue. It is well settled that district courts retain the power to enforce agreements entered into in settlement of litigation pending before them when the court's dismissal is conditional. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 901 F.2d 311, 317 (3rd Cir. 1990), *cert. denied*, 112 L. Ed. 2d 107, 111 S. Ct. 140; *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Hinsdale v. Farmers National Bank and Trust Co.*, 823 F.2d 993 (6th Cir. 1987)[2]; *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985); *Adduono v. World Hockey Association*, 824 F.2d 617, 621-22 (8th Cir. 1987); *Hamilton v. School Committee of City of Boston*, 725 F. Supp. 641 (D. Mass 1989).

In fact, it has been specifically held that while there is a conflict among the Circuit Courts of Appeals as to whether district courts generally have the inherent power to enforce settlement agreements "[t]here is agreement that while a case is pending, or whenever the court retains jurisdiction for the purpose, a district court may

[2] In *Hinsdale*, 823 F.2d at 995, n.1, the court held that "[w]here a district court dismisses a lawsuit pursuant to Rule 41(a)(2), the district court may condition dismissal upon performance of and retain jurisdiction to enforce terms of a settlement agreement". Here the dismissal was made without prejudice by the court pursuant to Rule 41(a)(2).

enforce a settlement agreement as part of its ancillary jurisdiction." *Hamilton v. School Committee of City of Boston*, 725 F. Supp. at 643. *See also Langella v. Anderson*, 734 F. Supp. 185, 190 n.12 (D. N.J. 1990) in which the district court for New Jersey surveyed various jurisdictions on this issue and noted that "[i]t is also well settled that a court has inherent power to enforce settlement agreements without an independent basis for jurisdiction where the agreement is incorporated in the order of dismissal or the court retains jurisdiction over some portion of the action". Dial's Petition does not cite any case law to the contrary.

A conditional dismissal was not at issue in *Fairfax Countywide Citizens Assn. v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978) *cert. denied*, 439 U.S. 1047, the case upon which Dial most heavily relies. Moreover, while the court in *Fairfax* held that, generally, a district court does not have the inherent power to enforce a settlement, it did concede that a district court does have such power under appropriate circumstances. *Fairfax*, 571 F.2d at 1304. In so doing, it approved of one aspect of the Sixth Circuit's reasoning on the issue stating that where "the settlement agreement resolved the dispute giving rise to the original litigation over which the district court had jurisdiction, any dispute involving the agreement itself was likewise properly before the court." *Id.* at 1304.[3] Here, the dispute involves the agreement itself. Therefore, even under *Fairfax*, the decision of the district court in this instance was correct.

[3] This statement underscores the factual distinction between *Fairfax* and the present case. In *Fairfax*, the plaintiff asked the district court to enforce a settlement in a case that had been dismissed for three years when a non-party to the litigation obtained an injunction against acts required by the settlement agreement. Here, the parties only asked the court to make a factual determination as to the terms of the agreement which settled the lawsuit.

B. The District Court's Dismissal Of The Underlying Action Was Conditional.

It has been consistently held that no specific language is necessary to effect a "conditional" as opposed to an "unconditional" dismissal. "[A]ll that is necessary is that it be possible to infer that [the trial judge] did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction." *McCall-Bey v. Franzen*, 777 F.2d at 1188.

In this case it is clear that the district court's dismissal was conditional. First, the dismissal was without prejudice. A final dismissal with prejudice was contingent upon the signing of a written settlement agreement. Second, the dismissal entry gave the parties leave to file a settlement agreement. On these bases, the Sixth Circuit made a factual determination that the dismissal was conditional. It stated:

> A plain reading of the district court's dismissal order indicates that it fully intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties. It is also worth noting that the parties, including Purex, construed the dismissal as "conditional" as evidenced by the motions for enforcement that were filed with the district court approximately four months subsequent to the district court's dismissal order.

(Appellate Decision at Pet. App. pp. A4-5).

Although Petitioners maintain that a district court cannot retain jurisdiction by entering a conditional dismissal, they do so without benefit of supporting case law. Moreover, the arguments they set forth in support of their position are unpersuasive; so much so that they were rejected by the only case from which Petitioners

cite supporting dicta.[4] Lastly, although Petitioners claim that the district court in this case could not have intended to retain jurisdiction to enforce the settlement because there was none at the time of dismissal, there was, in fact, a settlement. The settlement was what prompted the dismissal. The fact that it had not yet been committed to paper at the time of dismissal does not mean that the contract was not formed. *Arnold Palmer Golf Co. v. Fugua Industries, Inc.*, 541 F.2d 584, 587 (6th Cir. 1976) (applying Ohio law); *McMillen v. Willys Sales Corp.*, 118 Ohio App. 20, 193 N.E.2d 160 (1962).

Even assuming Dial's position is persuasive, this Court should not grant certiorari because the issue presented is based on an unusual fact pattern, not likely to consistently recur. Dial conceded that "the applicability of the retained jurisdiction theory is extremely limited" because most cases are not dismissed pursuant to Fed. R. Civ. p. 41(a)(2) (Petition at p. 18). *See also McCall-Bey*, 777 F.2d at 1184. Because the situation presented here arises from unique factual circumstances, this Court's review is not warranted.

This Court's inquiry, however, need not go that far. The Sixth Circuit made a factual determination that the district court's dismissal was conditional. Because there is no disagreement among the Courts of Appeals regarding a district court's ability to retain jurisdiction through a conditional dismissal, this case presents nothing for the United States Supreme Court to resolve.

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[4] The court, in *McCall-Bey*, only expressed doubt as to whether a dismissal pursuant to 41(a)(2) automatically gives a court inherent power to enforce a settlement. In *McCall-Bey*, as in this case, the court found that the language used in entering the dismissal rendered the dismissal conditional. *McCall-Bey*, 777 F.2d at 1188.

II. DIAL DID NOT RAISE THE ISSUE OF ITS ATTORNEYS' AUTHORITY TO ENTER INTO THE SETTLEMENT AGREEMENT BEFORE THE DISTRICT COURT.

Petitioners also claim that this Court should grant certiorari because they are entitled to a determination on an issue that both the district court and the Sixth Circuit refused to decide. Specifically, Petitioners contend that the district court refused to determine whether their attorneys had authority to enter into the settlement the court determined they had made. They further claim that when the issue was raised on appeal the Sixth Circuit erroneously found that it was not raised below. However, the fact remains that Dial did not raise the issue of authority in its Motion to Enforce or at the evidentiary hearing. Therefore, the district court was not compelled to decide the issue nor was the Sixth Circuit required to review it (Petition at p. 20).

It is axiomatic that an appellate court will not review on appeal issues that were not raised below. *Lujan v. Franklin County Board of Education*, 766 F.2d 917, 931 (6th Cir. 1985); *Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983), *cert. denied*, 464 U.S. 835; *Holden v. Owens-Illinois*, 793 F.2d 745, 754 (6th Cir. 1986), *cert. denied*, 479 U.S. 1008. Here, the Sixth Circuit had access to all of the pleadings, testimony and argument before the district court and made a factual determination that Dial had not raised the issue below. It stated:

> [W]e find nothing in the record which indicates that Purex raised the issue of its attorney's authority to settle this lawsuit in the lower court. There are no facts, nor is there any ruling by the district court, from which this court can properly review Purex's contention that its attorneys overreached their

> settlement authority. Accordingly, we hold that Purex did not properly preserve this issue for appeal. *Bailey v. Chattem, Inc.*, 684 F.2d 386 (6th Cir. 1982).

(Appellate Decision at Pet. App. pp. A5-6).

In its Petition, Dial presents no evidence demonstrating that it raised the issue in the district court. It only states that "the issue was raised by the evidence" (Petition at p. 20). The authority issue was not raised in the Petitioners' Motion to Enforce or in any other pleading. At the evidentiary hearing, Dial's counsel neither asked for a ruling on the issue nor, despite their contention in the Petition, addressed the issue in their argument. Dial's counsel only asked the court to make a factual determination as to what was agreed upon during the settlement discussions of December 6, 1988.

Petitioners, nevertheless, insist that the issue was raised because their attorneys testified that they did not have authority to settle any other litigation on Dial's behalf arising out of the fire.[5] Despite Petitioners' contentions, however, the mere fact that evidence which could support a finding on a certain issue is presented, does not mean that the issue was raised.

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[5] Dial asserted on appeal that an agent's own statements regarding its specific authority are "insufficient to establish that authority" (Appellants' brief at p. 18). At the evidentiary hearing Dial did not call any corporate representatives to testify on the issue of authority. Nor did it raise the authority issue in its Motion to Enforce, or otherwise put Respondents on notice of its contention. By failing to do any of the foregoing, Dial precluded Respondents from entering evidence on or cross-examining individuals with respect to this issue while still claiming to preserve it for appeal.

Even if this Court were to find that Dial preserved this issue for appeal, the Sixth Circuit, nonetheless, resolved the issue in favor of Willis Day. The court noted that Dial only cited cases involving an attorney's authority to enter into a binding agreement on behalf of his client in the context of real estate transactions (Appellate Decision at Pet. App. p. A6, n.3). The court went on to find that it appeared that in other circumstances where an attorney exceeded his authority, a client's remedy against the attorney was an action for malpractice, not an appeal to set aside an otherwise valid settlement agreement. *Id.* Therefore, even if the issue was preserved, it was reviewed and appropriately decided.

III. DIAL DID NOT RAISE THE ISSUE OF DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BELOW.

Lastly, Dial asserts that this Court should grant certiorari because the district court's refusal to decide the issue of its attorneys' authority denied it due process. This argument fails for two reasons. First, Dial's failure to raise the authority issue in the district court moots all issues based thereon as fully discussed in Section II of this brief. Second, assuming *arguendo,* the issue was raised before the district court, Dial was aware of the district court's alleged failure to address the issue when the district court rendered its decision. If Dial wanted to raise the due process issue, it should have done so at the appellate court level. Because this issue was not raised below it can not be raised at first instance before this Court. *Browning-Ferris v. Kelco Disposal,* 492 U.S. _____, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989).

Even if the due process claim had been properly raised, Dial's arguments thereon are nonetheless unpersuasive. Dial cites several cases for the proposition that "it is a violation of due process to decide an issue incorrectly" (Petition at p. 25). Based on that proposition, Dial goes on to state that *a priori* "it is a violation of due process to not decide the issue at all" (*Id.*). If Dial's reasoning is followed to its logical conclusion, any matter which this court could conceivably find had been wrongly decided would result in a denial of due process. This, of course, is simply not the case.

Dial states it was denied its due process guarantee of notice and opportunity to be heard despite the fact that Dial instituted the proceedings that gave rise to this petition, framed the issues to be determined and presented evidence in support of its position at the evidentiary hearing. In so doing, Dial did not raise the issue of authority. A due process argument cannot now cure Dial's failure to preserve issues for appeal.

CONCLUSION

This Court should deny Dial's Petition for Writ of Certiorari for three reasons. First, there is no conflict among Courts of Appeals with respect to a district court's authority to enforce a settlement agreement in an action that has been conditionally dismissed. Second, Dial failed to raise the issue of its attorneys' authority to settle in the district court and, therefore, that issue was not properly preserved for appeal. Third, Dial did not raise its due process claim before the Sixth Circuit Court of Appeals and, therefore, cannot raise it at first instance before this Court.

Respectfully submitted,

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